No. 10-79

In the

Supreme Court of the United States

METRO FUEL L.L.C.,

Petitioner

– v. –

CITY OF NEW YORK,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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I. THE OPEN CONFLICT AMONG THE CIRCUITS REGARDING THE PRECEDENTIAL EFFECT OF *METROMEDIA* WARRANTS THIS COURT'S ATTENTION

The City does not deny that there is pervasive uncertainty in the lower courts over the meaning and scope of this Court's fractured decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) Instead, the City claims that this widespread confusion is without prejudice, at least in this case, because the Second Circuit "undertook an exhaustive analysis of both *Metromedia* and the *Greater New Orleans* line of cases." Opp. 6 That is not true.

In its opinion, the Second Circuit concluded that *Metromedia* "is controlling" before it even *mentioned* the *Greater New Orleans* line of underinclusiveness cases. App. A-19 The court then brushed those cases aside, citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), for the proposition that it was constrained to "follow the case which directly controls," and concluding that "[a]s already discussed, the Supreme Court's decision in *Metromedia* is most directly on point." App. A-23-24. The Second Circuit found it "particularly significant" that, as the court read *Metromedia*, "the law of billboards" is "a law unto itself." App A-24 (quoting *Metromedia*, 453 U.S. at 501) In other words, outdoor advertising restrictions are not subject to the same scrutiny that applies to other commercial media because outdoor advertising is a "distinct First Amendment . . context." *Id.* There is no question that the Second Circuit believed its hands were tied

by *Metromedia*, and that this belief tainted its analysis of this Court's post-*Metromedia* underinclusiveness cases.

The Ninth Circuit's treatment of *Metromedia* in *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009), was, if anything, even more extreme. That court read *Metromedia* to require it do "exude[] deference" to municipalities' outdoor advertising restrictions. *Id.* at 910. Unlike the Second Circuit, the Ninth Circuit acknowledged the "tension" between *Metromedia* and this Court's subsequent underinclusiveness cases *Id.* at 908. But like the Second Circuit, the Ninth Circuit nonetheless held that it was "bound to follow the Supreme Court precedent most directly on point," which it concluded was *Metromedia Id.* at 911 ("*Metromedia* is such a case, and it controls the outcome.").

This case readily demonstrates the danger of allowing the pervasive confusion about the binding effect of *Metromedia* to fester. If the scheme at issue in this case is constitutional, then the First Amendment imposes no limits on the ability of municipalities seeking to generate revenue to auction off to the highest bidder exemptions to commercial speech restrictions. As the City would have it, it could ban commercial leafleting (for the ostensible purpose of minimizing litter) but nonetheless sell the exclusive right to distribute commercial leaflets on the City's sidewalks. It could ban tobacco advertising in close proximity to schools (for the ostensible purpose of combating teenage smoking) but exempt tobacco companies willing to fund after-school recreational programs. The federal

government could prohibit automated commercial telephone solicitations (for the ostensible purpose of insulating people from unwanted commercial intrusions in their homes) but nonetheless engage in the widespread use of automated telephone solicitations to market automobiles made by General Motors. That obviously is not the law.

II. THE DECISION BELOW EXACERBATES A PALPABLE CIRCUIT CONFLICT REGARDING THE QUANTUM OF EVIDENCE REQUIRED TO JUSTIFY THE SUPPRESSION OF COMMERCIAL SPEECH

The City does not deny that the First, Sixth, and Eleventh Circuits have held that the government must adduce a significant quantum of concrete evidence in order to meet its burden of justifying the suppression of commercial speech. *Pagan v. Fruchey*, 492 F.3d 766, 773-74 (6th Cir. 2007); *El Dia v Puerto Rico Dep't of Consumer Affairs*, 413 F.3d 110, 115-16 (1st Cir. 2005); *Mason v. Florida Bar*, 208 F.3d 952, 956-58 (11th Cir. 2000).

Instead, the City contends that the Second Circuit's opinion below does not conflict with these cases because, according to the City, the record contains "ample" evidence supporting its decision to exempt its franchisee's street furniture advertising signs from the restrictions that apply to everyone else Opp 7 That is false The record contains zero such evidence, which is why this case conflicts so squarely with *Pagan*, *El Dia*, and *Mason*.

To be sure, the record is consistent with the City's uncontroversial assertion that "the proliferation of advertising signs . . . impacts aesthetics." Opp. 7. But that is just a straw man. The question in this case is not whether advertising signs impact aesthetics. Of course they do. The question is whether the City has demonstrated a sufficient basis for treating petitioner's advertising signs so *differently* than it treats its franchisee's identical signs. It is undisputed that, apart from Mr. Woodward's "expert" opinion, the record contains no evidence whatsoever supporting the City's after-the-fact, litigation-minted theory that street furniture advertising signs are, by virtue of their placement on the sidewalk, incapable of impacting aesthetics.

The City also claims that the record contains "ample evidence" justifying its tolerance of "limited and controlled" advertising signs on street furniture despite its near-total prohibition of "uncontrolled" signage on adjacent private property. Opp. 8. That also is false. Indeed, the only evidence bearing on this issue – the 1996 report issued by the New York City Planning Commission following its study of the street furniture advertising proposal – expressly confirms that the City believed street furniture ads *would* have a significant adverse impact on aesthetics and neighborhood character, but that the negative aesthetic impact was tolerable in light of the City's desire to generate *revenue*. This record contains no evidence supporting the "controlled" versus "uncontrolled" construct that the City now conjures. Far from the product of any "reasonable legislative judgment," Opp. 9, the record confirms

that the City gave this supposed justification no consideration at all when it devised the scheme at issue.

Moreover, even if the "controlled" versus "uncontrolled" distinction had been considered by the policymakers who devised this scheme, it is a false dichotomy. The consequence of petitioner's underinclusiveness argument is *not* that it has the *unlimited* right to place advertising signs wherever it pleases. To the contrary, petitioner recognizes the City's substantial authority to impose reasonable time, place, and manner restrictions on advertising signs – such as, for example, size, height, spacing, illumination, and/or geographic restrictions – so long as the City deems such restrictions sufficiently important to apply to its revenue-generating franchisees. If the City wishes to ban advertising signs in residential zoning districts, it need only remove its street furniture signs from the many residential districts in which they have been placed. Just because the City's willingness to look the other way for the right price renders its scheme unconstitutional in this case does not mean that all signage on private property must be "uncontrolled."

Attempting to mask the discriminatory nature of its scheme, the City claims that it has not actually exempted its franchisee's street furniture signs because its advertising sign restrictions have "never applied to the City sidewalks." Opp. 9. That also is false. The City's advertising sign restrictions apply broadly to all "structures" and "open spaces" within a given zoning district. N.Y. Zoning Resolution § 11-01. Structures in public parks are expressly exempted, but structures on sidewalks are not. *Id.* § 11-13.

Indeed, the New York City Zoning Resolution contains numerous provisions that expressly restrict the use of the sidewalks, including, for example, provisions governing sidewalk cafes (*id.* § 14-10 et seq.) and the planting of sidewalk trees (*id.* § 95-10).[1]

For this reason, the City cannot persuasively distinguish Justice Scalia's fire-shouting hypothetical in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Substituting the facts of this case into Justice Scalia's hypothetical, it would read as follows:

> While [advertising sign restrictions] can be a core exercise of the State's police power to protect [aesthetics and neighborhood character], and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition [*i.e.*, granting an exemption in order to raise revenue] alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban

Id. at 837.

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[1] In any event, the City plainly could subject its street furniture franchisee to the requirements of the Zoning Resolution as a matter of contract if it chose to do so. Indeed, section 4.4.2 of the street furniture franchise agreement expressly requires Cemusa to comply with the City's electronic media restrictions that govern the property adjacent to any given street furniture structure. The City certainly could have required, as a matter of contract, that street furniture signs comply with *all* of the advertising restrictions that apply to adjacent property. But because doing so would all but wipe out Cemusa's entire inventory, the City chose not to require Cemusa to follow the rules that apply to everyone else.

The City urges that its scheme is merely akin to selling the right to yell fire in an *empty* movie theater because sidewalk advertising "was never prohibited in the first place" and "does not negatively impact aesthetics or neighborhood preservation. Opp 10. The first assertion is a legal fiction because, as demonstrated above, the Zoning Resolution does not expressly or impliedly exempt the City's sidewalks from all land use restrictions And the City tacitly acknowledges that the record contains no support for the second assertion by urging that it is "common knowledge" that street furniture advertising signs have no aesthetic impact on the streetscape. Opp. 9

The City's "common knowledge" argument is telling because it is the language of rational basis review. At bottom, that is the standard that both the Second and Ninth Circuits applied, in violation of more than thirty years of case law establishing that commercial speech restrictions are subject to substantial, searching scrutiny. *City of Cincinnati v. Discovery Network*, 507 U S 410, 417 n.13 (1993) (reaffirming this Court's "reject[ion]" of "mere rational-basis review" in commercial speech cases)

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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